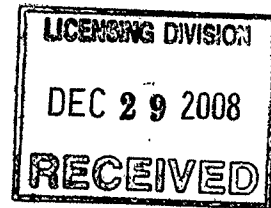


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DEC 29 2008

Copyright Royalty Board

Before the  
COPYRIGHT ROYALTY BOARD  
Washington, D.C.



In the Matter of )  
)

Distribution of the 1999 and )  
2000 Satellite Royalty Funds )  
)

Docket No. 2008-5 CRB SD 1999-2000

In the Matter of )  
)

Distribution of the 2001, 2002 )  
and 2003 Satellite Royalty Funds )  
)

Docket No. 2005-2 CRB SD 2001-2003

**PHASE I PARTIES' MOTION  
TO INITIATE A COLLATERAL PROCEEDING  
OR, IN THE ALTERNATIVE, TO MAKE A FURTHER DISTRIBUTION  
OF ROYALTIES PURSUANT TO SECTION 801(b)(3)(C) OF THE COPYRIGHT ACT**

The undersigned representatives of all Phase I categories ("Phase I Parties") respectfully request that the Copyright Royalty Judges ("Judges") initiate a collateral proceeding, as authorized by 17 U.S.C. § 803(a)(2). The purpose of the proceeding would be to determine whether Independent Producers Group ("IPG") may unilaterally compel the Judges to conduct a Phase I distribution proceeding to determine the Devotional Claimants' Phase I share of the 1999-2003 satellite royalty funds, notwithstanding that the Phase I Parties have negotiated a global Phase I settlement agreement. *See also* 17 U.S.C. § 801(c) (authorizing the Judges to make procedural rulings before commencing a proceeding). Alternatively, the Phase I Parties respectfully request that the Judges, pursuant to the procedures set forth in 17 U.S.C. §

801(b)(3)(C), order the further distribution of the portion of the 1999-2003 satellite royalties that the Judges have reserved to cover Phase I controversies. Under either approach, the Judges -- before commencing any Phase I distribution proceeding concerning the 1999-2003 satellite royalties -- should ascertain whether IPG is entitled to receive some portion of the 1999-2003 satellite royalties for programming within the devotional category and whether IPG's objection to the Phase I Parties' global Phase I settlement agreement and requested distribution of Phase I royalties is reasonable.

### BACKGROUND

The Phase I Parties negotiated a settlement agreement resolving all Phase I controversies over the 1999-2003 satellite royalties, including the share of royalties to be allocated in Phase I for devotional programming. *See* Phase I Parties' Notice of Settlement and Motion for Further Distribution (filed Nov. 14, 2008 ) ("Notice and Motion"). Those who participated in the negotiations were the same representatives of the same claimant categories that have negotiated and executed every prior Phase I satellite agreement since the inception of the satellite statutory license in 1988. Based upon that settlement, the Phase I Parties requested that the Judges distribute all remaining 1999-2003 satellite royalties, with the exception of a \$15,140,000 reserve to cover specific Phase II controversies involving claimants within the Program Suppliers, Joint Sports, and Devotional categories. *Id.* In addition, the Phase I Parties suggested that the Judges proceed under either (1) Section 801(b)(3)(A) of the Copyright Act, which authorizes distribution of any royalties that are "not subject to controversy," or (2) Section 801(b)(3)(C) of the Act, which authorizes partial distributions of the royalty funds after considering, among other things, whether any "claimant entitled to receive such fees has stated a reasonable objection to the partial distribution . . . ." *Id.*

IPG alone opposed the Notice and Motion, claiming that “no settlement had occurred,” at least with respect to the Devotional Claimants’ Phase I share, simply because IPG had not approved or disapproved the settlement. IPG Opposition to the Notice and Motion at 4 (dated Nov. 21, 2008) (“Opposition”). IPG further stated that at least two percent of the 1999-2003 funds should be reserved to “protect” copyright owners of devotional programming. *Id.* at 4-5. The Phase I Parties, including Devotional Claimants, replied, urging the Judges to reject IPG’s contention that there had been “no settlement” and to defer to a Phase II proceeding the issue of whether IPG is indeed entitled to a share of 1999-2003 satellite royalties. Phase I Parties Reply to IPG Opposition at 5 (filed Nov. 28, 2006) (“Reply”).<sup>1</sup>

On December 8, 2008, the Judges issued an order authorizing distribution of all but 10% of the remaining 1999-2003 satellite royalties -- thereby leaving a reserve of approximately \$22 million, or nearly \$7 million more than the Phase I Parties had recommended. The Judges proceeded under Section 801(b)(3)(A), which did not require consideration of whether IPG properly represented any claimants entitled to the royalty fees or whether IPG had any reasonable objection to the requested distribution or settlement. The Judges concluded, based

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<sup>1</sup> IPG subsequently filed an unauthorized sur-reply. *See* IPG Response to Phase I Parties’ Reply (dated December 3, 2008) (“Response”). Moreover, while IPG counsel represented in his Certificate of Service that he sent the Response to all Phase I Parties by overnight mail on December 3, 2008, the accompanying United States Postal Services (“USPS”) transmittal forms indicate that the Response was not placed in overnight mail until two days later -- on December 5, 2008. *See also* Status Report of Independent Producers Group Regarding Stay of Proceeding, Docket No. 2008-1 CRB CD 98-99 (Phase II) (Certificate of Service certifying overnight mailing on October 24, 2008, but USPS Express Mail receipt showing mailing on October 25, 2008).

IPG has a history of disregarding Copyright Office rules and regulations in cable and satellite royalty distribution proceedings. *See* Order in Docket Nos. 2001-8 CARP CD 98-99, *et al.* at 5-6 (June 26, 2006) (recognizing that IPG demonstrated a “flagrant disregard of the rules governing [CARP] proceedings and of the Orders issued therein, as well as a lack of respect for the Office and the other participants in [CARP] proceedings . . .”) (“June 26 Order”). As the Copyright Office further noted in the June 26 Order, “[a]ny future failure by IPG to comply with the Office’s regulations, especially those governing proper service of pleadings, will result in IPG’s dismissal from [CARP] proceedings . . .” *Id.* The Judges may wish to take such action now.

upon the filings before them, that “at least 90% of the remaining royalty fees are not in dispute” and that “there continues to be a controversy at least with respect to a certain portion of the 1999-2003 satellite royalties.” Order Granting in Part Phase I Claimants’ Motion for Partial Distribution of 1999 through 2003 Satellite Royalty Funds at 3 (filed December 8, 2008) (“December 8 Order”). The Judges further stated that they “intend to commence in the near future” a distribution proceeding. *Id.* at 3 n.10.

### DISCUSSION

1. The Phase I Parties very much appreciate the Judges’ prompt consideration of the Notice and Motion and their authorization of a further distribution of 1999-2003 satellite royalties prior to the end of the calendar year, as the Phase I Parties had requested. However, it appears from the December 8 Order that, solely because IPG alone has not approved the Phase I Parties’ global settlement, the Judges have effectively rejected that settlement, at least insofar as it specifies a Phase I share for the devotional programming category. It also appears that the Judges intend to commence, shortly, a distribution proceeding to determine the Phase I share for devotional programming.

A principal motivating factor for all Phase I Parties to enter into the settlement was, of course, to avoid the costs and uncertainties of a Phase I proceeding. Moreover, the Phase I Parties are concerned that, by its action, the CRB has given IPG -- a claimant with no record of participating in a Phase I proceeding and whose founder has a history of asserting fraudulent and invalid claims -- veto authority over a global Phase I settlement. That would give IPG a green light to trigger a costly Phase I proceeding merely by having its counsel assert, without any factual support, that it is entitled to receive some portion of the royalties at issue.

2. Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to “adopt as a basis for statutory terms and rates or *as a basis for the distribution of statutory royalty payments*, an agreement concerning such matters reached *among some or all of the participants in a proceeding* at any time during the proceeding . . . .” (Emphasis added). Section 801(b)(7)(A) provides the Judges with explicit guidelines as to when they should adopt settlements among some but not all the parties in rate proceedings, directing the Judges to determine whether the settlement agreement “provide[s] . . . a reasonable basis for setting statutory terms or rates.” *See* Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Docket No. 2006-3 CRB DPRA at 19 (Nov. 24, 2008). But the legislative history of Section 801(b)(7) describes the purpose of the guidelines on adopting settlements as applicable to both rate proceedings and distribution proceedings:

Subsection 801(b)(7) gives the CRJs the necessary authority to adopt as binding on all participants settlement agreements proposed by some or all of the participants in ratesetting or distribution proceedings. By facilitating and encouraging settlement agreements for determining royalty rates and establishing distribution of royalties, this section reduces the need to conduct full-fledged ratesetting and distribution proceedings. This will generate savings while expediting the disposition of proceedings. Clauses (i) and (ii) are designed specifically to address concerns about CRJs having authority to adopt as binding on all participants the terms of agreements proposed by subsets of participants. Clause (i) allows other participants in the relevant proceeding who would be bound by the proposed settlement to object to the CRJ’s adoption of the agreement. When an objection has been registered pursuant to clause (i), clause (ii) gives the CRJs discretionary power to decline to adopt the proposed agreement if they find, based on the record before them, that the agreement is not likely to meet the relevant statutory standard. Because settlement agreements can be offered at any time before final disposition of a proceeding, the extent of the record before the CRJs may vary widely depending on the timing of the settlement agreement. Bearing in mind the objective of encouraging settlement, the CRJs are to use their best judgment as to whether

the record before them indicates the proposed agreement is not likely to meet the relevant statutory standard.

H.R. Rep. No. 108-408, at 24 (2004). The plain statutory text combined with explanatory legislative history consistent with the statute provide a strong foundation on which the Judges may adopt the Phase I Parties' global settlement over the objection of IPG, even if it were able to establish that it is actually a "participant" in this Phase I proceeding.

Likewise, Section 801(b)(3)(C) authorizes the Judges, after providing notice and receiving the necessary representations from the requesting parties, to make a partial distribution of royalties notwithstanding the objection of a dissident claimant. The Judges must determine whether that claimant is "entitled to receive" the royalties at issue and whether it has "stated a *reasonable* objection." (Emphasis added). IPG's mere statements that it has a claim and that it objects to the distribution are not a sufficient basis to prevent distribution under Section 801(b)(3)(C).

3. The Phase I Parties urge the Judges not to commence Phase I proceedings to distribute the 1999-2003 satellite royalties unless and until they determine whether: (1) IPG is entitled to receive 1999-2003 satellite royalties; and (2) if so, IPG has stated a reasonable objection to the Phase I Parties' global settlement and proposed distribution of all such royalties other than those necessary to cover the pending Phase II disputes. The Phase I Parties believe that the Judges may make that determination by conducting a "collateral" proceeding authorized under Section 803(a)(2) of the Copyright Act, which empowers the Chief Copyright Royalty Judge to designate a Copyright Royalty Judge to "preside individually over such collateral and administrative proceedings . . . as the Chief Judge considers appropriate."<sup>2</sup> Alternatively, the

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<sup>2</sup> The Judges also may rely upon Section 801(c) of the Act, which provides that they may "make any necessary procedural or evidentiary rulings in any proceeding under this chapter and may,

Footnote continued on next page

Judges may follow the procedures specified by Section 801(b)(3)(C) of the Act. Regardless of which procedure is followed, the Judges should not allow IPG to thrust all the settling Phase I Parties into preparing for a costly and time-consuming Phase I distribution proceeding (and delay the further distribution of royalties) without a determination of IPG's entitlement to do so.

Given IPG's history in royalty distribution proceedings, it is particularly important for IPG to demonstrate that it is entitled to receive 1999-2003 satellite royalties for programming within the devotional category before it can upset a global Phase I settlement. *See* Order of the Librarian of Congress, Distribution of the 1993, 1994, 1995, 1996, and 1997 Cable Royalty Funds, Docket No. 2002-2 CARP CD 93-97, 66 Fed. Reg. 66433, 66437-40 (December 26, 2001), vacated due to settlement, 69 Fed. Reg. 23821, 23822 (April 30, 2004) (concluding that nearly all of IPG's Phase II claims within the Program Suppliers category were invalid);<sup>3</sup> Phase I Parties Reply at 4 (referring to felony conviction of IPG principal, who is still involved in IPG activities, for asserting fraudulent copyright royalty claims and lying under oath in that same Phase II royalty distribution proceeding before the CARP). In addition, IPG should be required to state with specificity its reasons for believing that the Judges should reject the settlement to

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Footnote continued from previous page

before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings conducted by the Copyright Royalty Judges . . . ."

<sup>3</sup> In that proceeding, IPG initially declared under penalty of perjury that it represented "the interests of dozens of rightsholders in the CARP proceedings, including such notable producers as DreamWorks, A&E Television, and the Academy of Television, Arts, and Sciences." *Independent Producers Group Motion to Accept Late Filing, etc.*, Docket No. 99-5 CD 97, at 3, Motion Exhibit B (filed October 1, 1999). In its direct case, however, IPG claimed only a small number of claimants and compensable titles. By the conclusion of the proceeding, the Librarian had determined that IPG represented only one claimant, Litton Syndications, which had a claim for only eight program titles. *See Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds*, Docket No. 2000-2 CARP CD 93-97 Ph. II (PS), Order dated June 5, 2001; *see also* 66 Fed. Reg. at 66439 and 66441.

which other parties have agreed -- particularly since it has given no reason whatsoever for its objection other than that it did not participate in the negotiations, which is plainly insufficient under Section 801(b)(7)(A) of the Act. Indeed, the only apparent basis for IPG's objection is its apparent strategy to hold the settlement hostage unless and until it receives some share of royalties without demonstrating any entitlement to do so. *See* IPG Response at 3 (indicating that IPG would not agree to any settlement unless the Devotional Claimants agreed "to support (or . . . not to oppose) IPG's request for a partial distribution if the settlement were accepted . . .").

### CONCLUSION

The Phase I Parties respectfully request that, before commencing any Phase I proceeding to distribute 1999-2003 satellite royalties, the Judges determine: first, whether IPG is entitled to receive such royalties; and second, whether IPG's objection to the Phase I Parties global settlement and requested distribution of Phase I royalties is reasonable. The Judges may make this determination by conducting a collateral proceeding under 17 U.S.C. § 803(a)(2). *See also* 17 U.S.C. §801(c) (authorizing Judges to "make any necessary procedural or evidentiary rulings . . . before commencing a proceeding under this chapter. . ."). Alternatively, the Judges may do so by following the procedures under 17 U.S.C. § 801(b)(3)(C) in response to the Phase I Parties' request for a further distribution of 1999-2003 satellite royalties. The Phase I Parties will participate fully in either such approach.



Respectfully submitted,

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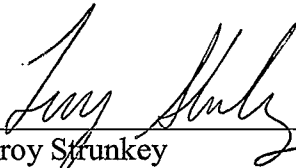
CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of December, 2008, a copy of the foregoing Phase I Parties' Motion to Initiate a Collateral Proceeding or, in the Alternative, to Make a Further Distribution of Royalties Pursuant to Section 801(b)(3)(C) of the Copyright Act, was sent by Federal Express overnight mail, to all of the individuals listed below:

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